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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Respondent and his *amici* do not quarrel with the proposition that advocating illegal drug use by minors is out of place in our nation's public schools. To the contrary, they accept the schools' fundamental interest in discouraging the use of illegal substances. Resp. Br. at 6 ("There is no dispute that schools have an important message to deliver regarding the perils of drug abuse."); *see, e.g.*, ACLJ *Amicus* Br. at 10-11 ("The physical and emotional vulnerability of youth . . . can justify more intrusive measures to detect and halt drug abuse.").[1]

Nevertheless, respondent and his *amici* suggest that petitioners have imposed a "pall of orthodoxy" over the Juneau-Douglas High School by prohibiting messages that promote illegal drug use. Resp. Br. at 12. They are mistaken. The same Juneau School Board policy that prohibits advocacy of illegal drug use explicitly recognizes that "[s]tudents will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions." Pet. App. 53a. Likewise, the School Board embraces students' rights to "explore fully and fairly all sides of . . . controversial issues." Juneau Sch. Bd. Policy 1240, *available at* http://www.jsd.k12.ak.us/

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[1] *See also* Drug Policy Alliance *Amicus* Br. at 29 (acknowledging "the inestimable seriousness of the problem of youth drug abuse"); Liberty Legal Inst. *Amicus* Br. at 14 ("The use of drugs is a criminal offense, and whatever disagreement there may be about the efficacy of the drug laws, or about the need for laws against adult use of the less dangerous illegal drugs, there is overwhelming consensus in the polity that adults should discourage children from using drugs."); Nat'l Coal. Against Censorship *Amicus* Br. at 7 ("Amici curiae share Petitioners' and the Government's commitment to promoting the health and well-being of our nation's youth by discouraging illegal drug use . . . .")' Rutherford Inst. *Amicus* Br. at 27 (noting "the dangers and perils of drug use"); Students for Sensible Drug Policy *Amicus* Br. at 9 ("Students often experience disproportionate pain in seeing family members, friends, and classmates suffer from drug abuse.").

newdistrict/departments/boardofeducation/policymanual/_displayPolicy.php?recid=13.[2]

Under no reasonable interpretation of this record were petitioners suppressing discourse over drug policy or any other political, religious, or ideological issue—in or out of the classroom. Nor are Juneau's student conduct rules challenged as overbroad or vague. *Cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.).[3] This case is also far removed from freedom-of-conscience concerns, *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), or attempts to restrict access to books or educational materials. *Cf. Bd. of Educ. v. Pico*, 457 U.S. 853 (1982). Rather, this case involves the enforcement of a valid student conduct rule that seeks to protect minors from illegal drug use—one of the most pressing social problems plaguing our nation's schools. *See* Pet. Br. at 26-30.

Even some of respondent's civil liberties champions accept the proposition that schools have authority to suppress pro-drug messages. The Liberty Legal Institute recognizes that "the age of the students and the educational context may justify restrictions on *advocacy of prohibited conduct* in public schools." Liberty Legal Inst. *Amicus* Br. at 15. "Education of children, and protecting children from self-destructive behavior," they reason, "is at the core of the mission entrusted to schools." *Id.* Exactly so. The Rutherford Institute similarly acknowledges that "the school arguably has a compelling interest in insuring a drug-free

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[2] The Board also mandates that students and parents be involved in the "collaborative process" of reviewing and revising school policies, regulations, and procedures that govern "student behavior and safety." J.A. 98.

[3] Respondent does not suggest that he was denied fair notice or due process. *Cf. Goss v. Lopez*, 419 U.S. 565 (1975).

environment within the school and in proscribing pro-drug messages on campus or where students formally represent the school system in academics, athletics, or extracurricular activities or on other school properties." Rutherford Inst. *Amicus* Br. at 24-25. We agree.[4]

Respondent seeks to avoid the precise issue of the case—schools' authority to proscribe pro-drug messages. *See* Resp. Br. at 7 ("This case is not about drugs."). He and his *amici* argue (unremarkably) that school officials should not have "unbridled discretion" to regulate religious and political speech. We agree. Vital constitutional assurances prevent such unfettered exercise of authority. We thus have no quarrel with *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), and the free-speech principles it embodies.

Agreement ends, however, when respondent and his *amici* choose to underread this Court's decisions in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The "special characteristics" of the public school setting call for judicial deference to the enforcement of reasonable school rules as school officials carry out their "basic educational mission." *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 685. Respondent thus seeks to recast this case as about adult speech in a public forum. This Court should reject that re-characterization, just as the courts below did. Analyzed properly, the facts establish—and the law demonstrates—that petitioners did not violate respondent's First Amendment rights and that Juneau-Douglas High

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[4] In contrast to Rutherford's suggested special limitations, this "compelling interest" extends to students attending school-sponsored events held off campus.

School's principal, Deborah Morse, is entitled to qualified immunity.

I. THIS IS A STUDENT SPEECH CASE.

Both the district court and the court of appeals—as well as the superintendent and the school board—agreed that the dispute at hand arose in the factual setting of a school event. *See* Pet. App. 5a ("[T]he facts established by the submissions on summary judgment make this a student speech case."); Pet. App. 34a-35a ("[T]here is no issue of fact as to whether or not this was a school-sponsored activity. . . . Frederick's presence at the event put him under the school's authority.").[5]

Respondent (and some of his *amici*) nonetheless insist that the factual record supports a finding that this is a "speech on a public sidewalk" case rather than a "student speech" case. Resp. Br. at 33-36; Drug Policy Alliance *Amicus* Br. at 4, 18-21; Nat'l Coalition Against Censorship *Amicus* Br. at 7-18; Rutherford Inst. *Amicus* Br. at 10-27; Student Press Law Ctr. et al. *Amicus* Br. at 6-15.[6] They are wrong. Respondent and these *amici* ignore a wealth of undisputed facts:

- The banner incident "occurred during school hours, at a time when parents expected their children to be under school supervision." Pet. App. 35a; *see* Pet.

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[5] *See also* Pet. App. 69a ("[T]he Board of Education affirm[s] the suspension of [Joseph Frederick] for the reasons given in the Superintendent's decision."); Pet. App. 63a ("I believe it unreasonable to find that Joseph can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school. His rights are those of a student at school.").

[6] Respondent's other *amici* analyze this case solely as a student speech case.

App. 5a-6a ("School had started . . . . Frederick was a student, and school was in session.").

- Principal Morse authorized teachers to allow their classes to observe the relay as it passed in front of the school. J.A. 23; Pet. App. 24a-25a, 34a.
- The student body, consisting of more than 1,000 students, congregated on both sides of the street in front of the school. J.A. 56; Pet. App. 24a-25a.
- Respondent stood directly across the street from school with a group of his classmates and one similarly-aged non-student.[7] J.A. 29, 35, 36; Pet. App. 2a, 25a, 70a.
- The high school pep band and cheerleaders were organized to greet the relay participants as they passed the school. Pet. App. 4a, 34a; J.A. 23.
- District personnel, teachers, and administrators were interspersed throughout the student body and were assigned supervisory roles. J.A. 23, 47-56; Pet. App. 34a; *cf.* Pet. App. 4a-5a, 17a.
- The School District spent funds on the event. In addition to school authorities assisting in the event's preparations and remaining on supervisory duty during the relay, the District also made supervised release time and transportation available for students

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[7] Respondent refers to the one identified non-student, Eli Geil, as "an adult on leave from duty in the U.S. Army." Resp. Br. at 3. This factually insignificant (and legally irrelevant) foray need not give this Court pause. In any event, respondent is mistaken. Even his record citation (J.A. 65) indicates that this person enlisted some months *after* the events in question. According to school district directory information, at the time of the banner incident, the would-be adult non-student was actually sixteen years old and had been a 9th-grader at Juneau-Douglas High School during the prior school year.

from schools not along the relay route so that they could participate in the event. J.A. 23; Pet. App. 63a.

- School rules provided that "[p]upils who participate in approved social events and class trips are subject to district rules for student conduct." Pet. App. 58a. The student handbook likewise explained that the discipline guidelines applied to infractions committed "at school sponsored/sanctioned functions." J.A. 100, 103.

These facts firmly establish that respondent was a student subject to school authority at the time he unfurled his banner. As such, his First Amendment rights must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Respondent created no genuine issue of fact in this respect. Pet. App. 6a, 34a. Having failed to convince the superintendent, the school board, the district court, and the court of appeals that he was not under the school's aegis, he trots out again several previously-rejected points: (i) he was eighteen years old; (ii) he was not standing on school property; (iii) he had not been present at school prior to showing up to the location where he unfurled his banner; (iv) the relay was a public event; and (v) the event was (allegedly) unsupervised. Resp. Br. 34-35. We briefly respond to each.

Respondent provides no authority supporting the theory that an eighteen-year-old high school student is entitled to ignore school disciplinary rules (including those governing expressive conduct).[8] Nor does he muster support for the proposition that school rules are inapplicable to high school students participating in school activities located off

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[8] To the contrary, the Court has observed that "older students," through "their conduct and deportment in and out of class," set an important example for younger students. *Fraser*, 478 U.S. at 683.

campus.[9] Absent such authority, Juneau's student conduct policies unequivocally state that the rules apply during off-campus school events, Pet. App. 58a, and nowhere do the rules provide for an age-based exemption.

Respondent's tardy arrival at school is likewise unavailing. He could have selected myriad locations along the ten-mile relay route to carry out his publicity stunt. He instead chose to position himself front-and-center before the assembled student body, where his banner would be visible to his fellow students. School authorities were responsible for the safety and good conduct of students in attendance, including respondent. J.A. 24, 96; Pet. App. 53a, 58a. By joining in with his fellow students and participating in the school's viewing of the relay, respondent voluntarily submitted to the school's authority.

In addition, the school's assembled viewing of the relay (whether labeled "school sponsored," "school sanctioned," or "school authorized") was no less of a school event by virtue of the fact that the relay itself was a community-wide event (with public and private sponsors). Students on field trips unquestionably remain entrusted to school authorities' care

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[9] Some of respondent's *amici* cite cases where students' off-campus expressive activities were found to be immune from school punishment. None of the examples involve student expression taking place during an off-campus school event—let alone at an event where the students gathered together on and adjacent to campus. *Compare, e.g., Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1048 (2d Cir. 1979) (invalidating student suspensions for distributing underground newspaper that was published and distributed off campus and not during any school event), *with McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (upholding school's prohibition against student band playing song "White Rabbit" at off-campus school event). In addition, as a matter of hornbook education law, student disciplinary authority extends to off-campus school-related activities. 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006).

and supervision. This jurisdictional responsibility remains regardless of who sponsors the exhibit (or event).

Finally, respondent asserts (in his restated "Questions Presented") that the event was "not . . . supervised by the school." Resp. Br. at i. Not so. Respondent's only evidence consists of affidavits from three students, two of whom stated they were co-participants in the banner incident. J.A. 32-33, 36-38. These three students variously stated that (i) they were "released" to see the relay; (ii) they were not required to stay with their classes; (iii) some students were running around, throwing snowballs, or otherwise acting up; and (iv) some students slipped away or did not attend the event. *Id.*

None of the three students claim that they had been released *from school.* Rather, they state that teachers permitted students to leave their classrooms for the purpose of watching the relay as it passed in front of the school. J.A. 32 ("[M]y teacher released us to go see the relay . . . ."); J.A. 36 ("[T]he school allowed students to go out to the street to watch [the relay]."); J.A. 38 ("[T]he teacher announced that we could go watch [the relay]."). *Cf.* J.A. 23 ("Students were not 'released' from school . . . ."); J.A. 47, 49, 51, 53 (same).

True, most teachers did not require students to stay with their particular classes, but students were required to remain with the student body. J.A. 47, 49, 51, 53. So too, some in the crowd became unruly—namely, students in Frederick's vicinity—and others may have managed to sneak away. J.A. 56. But respondent proffers no authority for the odd (and unworkable) proposition that schools relinquish supervisory authority if some students break the rules.[10]

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[10] Indeed, if a student had been injured during the school's torch relay viewing, the school could have faced potential liability for negligent supervision. *See generally* Allan E. Korpela, Annotation, *Tort liability of*

In any event, official supervision did exist. Principal Morse declared (without contradiction) that "teachers, administrators and other staff were interspersed throughout the body of students at appropriate intervals for maintenance of crowd control." J.A. 56. In addition, the student affiants' teachers confirmed (again, without contradiction) that they "assist[ed] in providing crowd control with the student body in general." J.A. 47-54. This is confirmed by respondent himself, who acknowledges that he and his friends "could see some school officials trying to stop [other students from throwing things]." J.A. 29. Nor is there any dispute that Principal Morse, who responded immediately to respondent's banner display, supervised the event:

> I was stationed directly in front of the high school supervising crowd control. I was assisted by other administrators, classroom teachers and school staff. I passed back and forth across the street on numerous occasions, as required, in order to maintain proper supervision of the student body.

J.A. 23 Indeed, it is uncontroverted that Principal Morse approached Frederick and his friends at least twice—once to investigate the throwing of snowballs launched from their vicinity and then again when Frederick unfurled his banner. J.A. 24. The pivotal point remains—official school supervision existed at the event.

The material facts are clearly established. Frederick has shown no error in the concurrent findings by the two courts below. *Cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). As the Ninth Circuit succinctly

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public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision, 38 A.L.R.3d 830 (1971 & Supp. 2007).

observed in the opening sentence of its opinion: "This is a First Amendment student speech case." Pet. App. 1a. The *Tinker-Fraser-Kuhlmeier* framework therefore governs.

II. PETITIONERS DID NOT VIOLATE THE FIRST AMENDMENT BY DISCIPLINING RESPONDENT FOR PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL EVENT.

A. In the context of constitutional assurances against unfettered discretion, public school authorities may restrict student speech that undermines the "basic educational mission."

Respondent and his *amici* vigorously attack a central unifying principle from this Court's First Amendment student speech jurisprudence: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission, even though the government could not censor similar speech outside the school.'" *Kuhlmeier*, 484 U.S. at 266 (citing *Fraser*, 478 U.S. at 685). This, they fear, is too broad. To cabin its reach, respondent suggests that this principle has no application beyond the specific facts of the Court's *Tinker-Fraser-Kuhlmeier* trilogy. Resp. Br. at 25. Some of his *amici* dismiss the principle as a "novel"—even "dangerous"—standard. *See, e.g.*, Nat'l Coal. Against Censorship et al. *Amicus* Br. at 19; Lambda Legal Def. & Educ. Fund *Amicus* Br. at 13-14. Their stated concern is that public schools would have "unbridled discretion" to randomly define and oppressively enforce whatever "missions" they choose for themselves. *See, e.g.*, Liberty Counsel *Amicus* Br. at 6.

What respondent and his *amici* ignore is that school board officials who develop student conduct rules, and administrators who enforce such rules, are constrained by the overarching requirement of "reasonableness" in the context of constitutional limitations on state power. The Free Speech Clause, observed the *Tinker* Court, permits "reasonable

regulation of speech-connected activities in carefully restricted circumstances." 393 U.S. at 513; *cf. id.* at 517 (Black, J., dissenting) (identifying "reasonableness" as the majority's standard for judicial review of school disciplinary regulations).[11] In the *Tinker* Court's view, the school district's ban on armbands, which was based *solely* on "an urgent wish to avoid the controversy which might result from the expression," was an unreasonable regulation. 393 U.S. at 510. The *Tinker* ban could have passed constitutional muster, however, if school officials had shown "interference, actual or nascent, with the schools' work." *Id.* at 508. The *Fraser* standard for regulating "offensive" speech is likewise properly understood as one of "reasonableness."[12] Justice Brennan, in concurring, opined that it was "not unreasonable" for school officials to condemn Matthew Fraser's language. 478 U.S. at 689 & n.2 (Brennan, J., concurring).[13] Similarly, in *Kuhlmeier*, the Court employed a "reasonable basis" standard in reviewing a school district's

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[11] *Tinker* relied on lower court decisions applying a reasonableness standard in reviewing student speech regulations. *Id.* at 505 & n.1, 509, 511, 513 (citing *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). *See also Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2d Cir. 1971) ("*Tinker* as well as other federal cases, e.g., *Blackwell* . . . and . . . *Burnside* . . . , establish that, if students choose to litigate, school authorities must demonstrate a reasonable basis for interference with student speech, and that courts will not rest content with officials' bare allegation that such a basis existed.").

[12] *See Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000) (describing "reasonableness or balancing standard of *Fraser*"); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996) (applying "reasonableness" standard under *Fraser*).

[13] In Justice Brennan's view, the student's speech was mild by adult standards, but he nevertheless deferred to the "discretion" of school officials who concluded that the speech "disrupted the school's educational mission." *Id.* at 687-89 (Brennan, J., concurring).

censoring of student newspaper articles. The Court upheld the school officials' actions as "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

In sum, the analyses applied in the *Tinker-Fraser-Kuhlmeier* trilogy reflect a balancing of interests. A student's interest in freedom of expression is necessarily weighed against the school's interest in maintaining order, inculcating socially appropriate norms, and achieving educational goals. This balancing or reasonableness standard extends to public schools' definitions of their basic educational mission.

Respondent and his *amici* further contend that a school's educational mission could be defined so broadly that non-disruptive, non-offensive, and non-school-sponsored religious and political viewpoints could be suppressed. Untrue. Important constitutional safeguards protect against this. In the case of religious or anti-religious expression, student free speech rights are further informed by the Establishment Clause, the Free Exercise Clause, and the equality principle unifying our system of free expression. Under this well-developed constitutional framework, a school's educational mission cannot be to inculcate religious beliefs or to favor one religion over others. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). So too, schools cannot seek to avoid controversy by banning religious speech or imposing secular humanistic worldviews. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001).

Student political expression likewise enjoys protection, most notably for reasons elucidated in *Tinker*, which stands for the proposition that schools may not suppress student political expression merely to avoid controversy. 393 U.S. at 513. Likewise, a school's educational mission cannot be the suppression of ideas motivated by "narrowly partisan or political" concerns. *Pico*, 457 U.S. at 870. Indeed, in the various opinions of *Pico*, no member of the otherwise

sharply divided Court took issue with this basic proposition. *Id.* (plurality opinion); *id.* at 877-78 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 907 (Rehnquist, J., dissenting).

Other *Tinker*-related safeguards exist to prevent schools from devolving into pockets of oppression. Student speech regulations are facially challengeable on overbreadth and vagueness grounds. *Saxe*, 240 F.3d at 214. Students are entitled to fair notice of the scope of speech restrictions and may challenge punishment on due process grounds. *Goss*, 419 U.S. at 574-75. Here, respondent advanced no such facial challenge to Juneau School Board policies, nor did he assert any procedural due process violation. In short, allowing schools to fashion and enforce reasonable policies to protect their basic educational mission is fully compatible with our constitutional order.

B. Student speech that promotes illegal drug use is not protected in the public high school environment.

Respondent equates his pro-marijuana banner with John Tinker's passive armband wearing. Resp. Br. at 21. To state the obvious, the two messages are vastly different. Promotion of illegal drug use and the drug culture is uniquely undeserving of First Amendment protection in the school setting. Pro-drug messages targeted at adolescents foster a social harm distinctly damaging and disruptive.[14] "Students

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[14] Judicial acknowledgement that pro-drug messages inherently disrupt the work of the schools is illustrated by *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980)—an opinion that neither respondent nor his *amici* criticize. At least one of respondent's *amici* embraces *Williams* as a proper example of student discipline because the pro-drug message involved a "direct, unambiguous endorsement of illegal activity" that had no literary value or similar value, such as a serious discussion of drugs. Students for Sensible Drug Policy *Amicus* Br. at 21; *accord* Resp. Br. at

are more likely to use substances when the norms in school reflect a greater tolerance for substance use." Revathy Kumar et al., *Effects of School-Level Norms on Student Substance Abuse*, 3 Prevention Sci. 105, 121 (June 2002). *See* D.A.R.E. Am. et al. *Amicus* Br. at 11-12.[15] Allowing students to dilute a school's anti-drug message—which is an integral part of the district's health curriculum—undermines the basic educational mission.

Fraser likewise supports suppressing respondent's banner. Respondent and his *amici* try to limit *Fraser* to sexual speech. But *Fraser* allows regulation of categories of speech much broader than sexual innuendo—in particular, speech that offends the "sensibilities of others" (including fellow students) or that does not reflect "socially appropriate behavior." 478 U.S. at 681. Respondent ignores the rationale behind the *Fraser* Court's more expansive allowance of speech restrictions in public high schools—that

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24 n.17. Notably, the "unambiguous" pro-drug message in *Williams* was a store's advertisement for *bongs*. *See* 622 F.2d at 1203 ("The advertisement primarily promoted the sale of a waterpipe used to smoke marijuana and hashish."). If prohibiting a small print ad for bongs is acceptable, it follows logically that a 14-foot "bong hits" banner can be suppressed.

[15] The drug policy reform organizations supporting respondent take issue with the effectiveness of certain campaigns to discourage teenage drug use. *See* Drug Policy Alliance et al. *Amicus* Br. at 17; Students for Sensible Drug Policy *Amicus* Br. at 20. This Court need not resolve a policy debate on the efficacy of drug-use prevention programs here. That is a burden belonging to local school officials. If school officials reasonably determine that proscribing pro-drug messages will advance their interest in discouraging teenage drug use, federal courts should not meddle with such a determination.

certain types of expression are not suitable for adolescents. *Id.* at 683-85.[16]

Respondent further seeks to narrow *Fraser*'s reach to student expression that is "disruptive" and "school sponsored." Resp. Br. at 13-15, 26. Not even the Ninth Circuit goes so far. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (clarifying that *Fraser* applies even absent disruption and school sponsorship). Indeed, this Court explicitly rejected any notion that *Fraser* required disruption. *Kuhlmeier*, 484 U.S. at 271 n.4. And *Fraser* itself did not turn on any school-sponsored aspect of Matthew Fraser's speech.[17]

Respondent and his *amici* accuse petitioners of viewpoint discrimination[18] as if this tenet of First Amendment applied fully to the public school setting. In any event, this Court's student-speech doctrine does not forbid it in all circumstances. *Tinker*, for instance, would allow curtailment of viewpoint-based speech if the expression was reasonably likely to interfere with the work of the schools. 393 U.S. at 508, 513; *see, e.g.*, *Williams*, 622 F.2d at 1205-06. Similarly,

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[16] By analogy, film industry ratings reflect commonly-accepted age-appropriate content categories, namely, sex, violence, language, and drugs. *See* Motion Picture Ass'n of Am., *What do the ratings mean?*, *available at* http://mpaa.org/FlmRat_Ratings.asp ("There is no drug use content in a PG-rated film. . . . Any drug use content will initially require at least a PG-13 rating. . . . An R-rated film may include . . . drug abuse, . . . so parents are counseled in advance to take this advisory rating very seriously. . . . The reasons for the application of an NC-17 rating can be . . . drug abuse . . . which, when present, most parents would consider too strong and therefore off-limits for viewing by their children.").

[17] If Fraser's sexually-laced speech to a *voluntary* school assembly constituted "school-sponsored" speech, then the facts here are equally compelling that Frederick's sign reasonably bore the school's imprimatur.

[18] The assertion is ironic in view of Frederick persisting, "I wasn't trying to spread any idea." J.A. 68.

assuming that a ban against promoting drugs can constitute viewpoint discrimination, then the Court endorsed such an approach in *Kuhlmeier*, in the context of school-sponsored student expression. 484 U.S. at 272. Under respondent's theory, so long as classroom work is not disrupted, students are free to use their school day to promote (to a captive audience of their schoolmates) whatever antisocial activity they fancy. *Contra Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) (upholding prohibition of certain rock band t-shirts due to band's overt ties to suicide, violence, and drug abuse), *cert. denied*, 532 U.S. 920 (2001). In respondent's view, school authorities should be powerless to remove such counterproductive messages from the school environment.

Fundamentally, respondent and his *amici* fail to discern the "special characteristics" of the school environment. *Tinker*, 393 U.S. at 506. They seek to thrust into the public school milieu the full robust conception of adult free speech rights. *See, e.g.*, Resp. Br. at 30 (arguing that public high school students have a right to promote criminal activity in school); Drug Policy Alliance *Amicus* Br. at 6 n.1 (asserting that advocacy of unlawful conduct is protected here under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1967)). Case law involving adult speech in a public forum is only useful to the extent that principles are recast to take into consideration the custodial and tutelary nature of the school setting and the *in loco parentis* responsibilities of school authorities. Viewed through the "special characteristics" lens, banning students from promoting illegal drug use is entirely reasonable.

C. School officials must have authority to reasonably interpret student expression in its context.

Respondent and some of his *amici* seem to advocate comprehensive, non-deferential judicial review of school officials' decisions to restrict student expression. Resp. Br. at 25-26; Liberty Legal Inst. *Amicus* Br. at 3-4. This is

unworkable. "Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries." *See Brandt v. Bd. of Educ.*, Nos. 06-1999, 06-2573, 2007 WL 641516, at *5 (7th Cir. Feb. 20, 2007) (Posner, J.).

First Amendment analysis is inevitably contextual. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Teachers and administrators responsible for enforcing student speech policies are called upon to interpret messages in a variety of circumstances. These officials are the pivotal (and front-line) message interpreters. A school official's interpretation of a student's expression should not be disturbed by a court unless the interpretation, in its context, is manifestly unreasonable. *See Pyle By & Through Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 170 (D. Mass. 1994) ("[U]nless federal courts are to take on the task of assessing, each morning of the school year, the latest creations of the adolescent imagination . . . [,] the limits on vulgarity in secondary schools, assuming a general standard of reasonableness, are to be defined by school administrators, answerable to school boards and ultimately to the voters of a community.").

Principal Morse reasonably understood respondent's banner as glorifying illegal marijuana use. Respondent offers no credible alternative meaning.[19] He was not punished for

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[19] Respondent suggests that his banner was a protest of "an earlier incident in which an assistant principal threatened him with suspension because he did not stand during the Pledge of Allegiance." Resp. Br. at 2 n.1. No school records or witnesses corroborate this allegation, and petitioners refute it. In any event, there is no evidence that anyone viewed or understood respondent's banner as a protest. Frederick's testimony mentioning the purported Pledge incident was nowhere included in the district court record. Respondent thus advised the court of appeals that "this reference is properly disregarded." Partial Opp'n to

expressing political or religious views. Pet. App. 62a. He was suspended because he violated school board policy against promoting illegal drugs and because he committed several other infractions before and after the banner incident. Pet. App. 59a-67a.

Principal Morse's interpretation of the banner has withstood two administrative appeals and review by the district court and court of appeals. Pet. App. 6a-7a, 38a, 61a-62a, 69a. This Court should not disturb that finding, and should not engage in anything more than a judicial check of reasonableness.

III. PRINCIPAL MORSE IS ENTITLED TO QUALIFIED IMMUNITY.

If reasonably competent school officials could disagree on the lawfulness of Principal Morse's enforcement of school board policy, then she is still entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Principal Morse readily satisfies this test. The reasonably competent school officials who deemed her actions lawful include Superintendent Bader and the unanimous Juneau School Board. *See also* Nat'l Sch. Bds. Ass'n et al. *Amicus* Br.; U.S. *Amicus* Br. (joined by Dep't of Educ.). If that were not enough, Chief Judge John Sedwick also agreed that she did not violate a "clearly established" right. Tellingly, none of the eighteen *amicus* organizations supporting respondent assert that Principal Morse should have been denied qualified immunity.[20] The Ninth Circuit's immunity ruling, which

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Appellees' Mot. to Strike Portions of Appellant's Excerpts of R. We agree.

[20] Respondent's only *amicus* to address qualified immunity suggests that the district court may have erred in granting immunity to the Juneau School Board. Ctr. for Individual Rights *Amicus* Br. at 2. This is of no moment. Frederick did not appeal the district court's ruling on the school

holds Principal Morse to an uncompromisingly high standard in making predictive judgments about future appellate court rulings, is incompatible with this Court's teachings. *Malley*, 475 U.S. at 341.

Respondent asserts that Principal Morse's adherence to the (unchallenged) School Board Policy 5520 was "objectively unreasonable." Resp. Br. at 42 & n.29. This is squarely at odds with this Court's analysis in *Wilson v. Layne*, which recognized that reasonable reliance on established policies and practices may immunize a public official's actions. 526 U.S. 603, 616-17 (1999). Respondent thus ignores the contextual particularity required to find a violation of a "clearly established" right. *Id.* at 616-17.

Respondent further argues that Ninth Circuit case law "appl[ied] with obvious clarity" in allowing students' pro-drug messages. Resp. Br. at 39 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Not so. Indeed, the Ninth Circuit previously had cited with approval the Fourth Circuit's decision in *Williams*, 622 F.2d 1200, which upheld a public high school's ban on distributing an underground newspaper because it contained an advertisement for bongs. *See Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 (9th Cir. 1982) (citing *Williams* for the proposition that students' rights "may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment"). Until the Ninth Circuit's decision below, the court of appeals more seemingly had endorsed the suppression of pro-drug messages by public high schools.

The Ninth Circuit veered far off the path of this Court's qualified immunity jurisprudence. As a result, a fourth-

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board's immunity, and he does not raise it here. He confined his appeal to Ms. Morse's immunity.

generation teacher and second-generation principal who has devoted a decade of her teaching career to special education and ultimately took on the formidable challenge of managing a large urban public high school, now is subjected to the "fear of personal monetary liability and harassing litigation." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). That should not be.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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